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In the Supreme Court of the United States

October Term, 1979

79-1277

TREPEL PETROLEUM CORPORATION,
Petitioner,
v.
CLEVEROCK ENERGY CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

October Term, 1979

TREPEL PETROLEUM CORPORATION,
Petitioner,
v.
CLEVEROCK ENERGY CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in *CleveRock Energy Corporation v. Martin Trepel and Trepel Petroleum Corporation*, Nos. 78-1054 and 78-1055.

I. OPINIONS BELOW

The opinions of the United States District Court for the District of Colorado have not been reported and are appended hereto as Appendix A and Appendix B. The opinion of the United States Court of Appeals for the Tenth Circuit has been reported at 609 F.2d 1358 and is appended hereto as Appendix C.

II. JURISDICTION

The judgment and opinion of the Court of Appeals were entered on November 20, 1979. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari under 28 U.S.C. § 1254(1).

III. QUESTION PRESENTED

Whether it is consistent with Due Process for a Colorado federal court to assert personal, "long-arm," jurisdiction over the defendant Michigan corporation in an action for breach of a contract negotiated and executed in Michigan and to be performed in Oklahoma when such jurisdiction is based only upon (i) one visit of a person to the forum state for an unrelated purpose where that person subsequently became an officer of the defendant corporation upon its formation several months after the visit and (ii) actions of the plaintiff in the forum state in the conduct of its general business operations.

IV. STATUTE INVOLVED

Colorado Revised Statutes of 1973, Title 13, Article 1, Section 124 (C.R.S. 1973 § 13-1-124), provides:

Jurisdiction of Courts. (1) Engaging in any act enumerated in this section by any person, whether or not a resident of the state of Colorado, either in person or by an agent, submits such person, and, if a natural person his personal representative to the jurisdiction of the courts of this state concerning any cause of action arising from:

(a) The transaction of any business within this state;

(b) The commission of a tortious act within this state;

(c) The ownership, use, or possession of any real property situated in this state; or

(d) Contracting to insure any person, property, or risk residing or located within this state at the time of contracting.

V. STATEMENT OF THE CASE

This is an action for breach of contract by plaintiff-respondent CleveRock Energy Corporation ("respondent"), against defendant Martin Trepel ("Trepel") and defendant-petitioner Trepel Petroleum Corporation ("petitioner"). Respondent is an Indiana corporation and maintains its principal place of business in Colorado. Trepel is a Michigan resident and president of petitioner. Petitioner is a Michigan corporation with its principal place of business in Michigan.

The contract in question related to a water flood project in an existing oil and gas field, Scott Field, located in Creek County, Oklahoma, in which respondent owns the majority

of the leasehold interests. Petitioner was to pay respondent $177,750 plus 50% of the development costs of the project in return for a 50% interest in the field and in the oil produced from the proposed water flood.

Trepel became aware of the proposed project through Peter Burnett, a consulting petroleum engineer, who investigated it in October 1974 for another client of Burnett's unrelated to Trepel or petitioner. Trepel first spoke about the project with Dan Cleveland, president of respondent, on November 20, 1974. Trepel was returning home to Michigan from Texas and met Cleveland for about two hours in Denver, Colorado, to sign an unrelated agreement entered into between respondent and Trepel individually.[1] At that time Cleveland also furnished Trepel with certain documents describing the Scott Field project. This brief stopover was the only physical entry into Colorado by either Trepel or any other officer or agent of petitioner for anything in connection with Scott Field.

Subsequently, Trepel and Cleveland pursued negotiations on the Scott Field project by telephone. In February, 1975, Cleveland traveled to Detroit, Michigan, and attended a meeting with Trepel and others where the formation by Trepel of a corporation (eventually to become petitioner) to enter into the proposed agreement was discussed. Petitioner was incorporated shortly thereafter on or about February 24, 1975.

Negotiations by telephone continued until March 4, 1975, when Cleveland mailed Trepel a letter agreement for Scott Field to be entered into between respondent and petitioner. Trepel executed this agreement as president of petitioner on March 7, 1975, in Michigan and returned it to Cleveland by mail.

[1]This was the Dove Creek Agreement described in Note 2 below.

Petitioner thereafter encountered difficulty in obtaining the anticipated financing for performing the Scott Field Agreement. Trepel and Cleveland had numerous long-distance telephone conversations in March and April 1975 regarding the matter. In April 1975, Cleveland attended a second meeting in Detroit, Michigan, with Trepel and others to discuss modification and extension of the Scott Field Agreement. Petitioner continued with further efforts to raise the funds necessary to fulfill the Scott Field Agreement. On May 23, 1975, Cleveland informed Trepel by telephone that respondent would no longer hold the Scott Field deal open and that the project had already been placed elsewhere.

Respondent initiated this action in the United States District Court for the District of Colorado pursuant to 28 U.S.C. § 1332 seeking to recover damages from Trepel and petitioner for their alleged failure to provide financing for the Scott Field project as required under the March 4, 1975, letter agreement.[2] Jurisdiction was predicated on the Colorado "long-arm statute," C.R.S. 1973 § 13-1-124, *supra*, and service on the defendants was made outside of Colorado. Trepel and petitioner answered the complaint and raised as a defense the court's lack of personal jurisdiction. Petitioner also asserted mandatory counterclaims against respondent for respondent's premature termination and breach of the Scott Field Agreement.

[2]The action actually consists of two claims for breach of two unrelated contracts. The first claim is based upon an alleged breach of the Dove Creek Agreement between respondent and Trepel, personally, which involved drilling an oil well in Dolores County, Colorado. Judgment was entered by the District Court in respondent's favor on this claim, which was affirmed by the Court of Appeals. No relief is sought by Trepel in this Petition from the judgment on this first claim. The second claim is based upon an alleged breach of the Scott Field Agreement between petitioner and respondent. Only this second claim is the subject of this Petition.

Trepel and petitioner presented their objection to personal jurisdiction on the Scott Field claim in a motion for partial summary judgment. The District Court denied that motion in an oral ruling rendered on April 21, 1976, based primarily upon the court's interpretation of Colorado case law. (Appendix A). The court held that Trepel and petitioner had purposely availed themselves of the privilege of acting in Colorado or causing important consequences in Colorado to an extent sufficient to make the exercise of personal jurisdiction over Trepel and petitioner reasonable and that it was not unfair to require Trepel and petitioner to litigate the matter in Colorado because of their contacts with the state and the present day ease of mobility. (Appendix A at 2a-3a).

The case was subsequently tried and the District Court issued its Memorandum Opinion and Order on November 17, 1977, wherein Trepel was found not personally liable on the Scott Field Agreement. Although petitioner was found to have breached the Agreement, no damages were found to have been established. In addition, petitioner's counterclaim against respondent for breach of the Agreement was dismissed by the court. (Appendix B at 19a-23a).

On appeal by Trepel and petitioner and cross-appeal by respondent, the Court of Appeals for the Tenth Circuit affirmed the judgment of the District Court on all points, including the finding of personal jurisdiction over petitioner on the Scott Field claim. The court held that the Colorado long-arm statute confers jurisdiction limited only by the bounds of the Fourteenth Amendment to the United States Constitution. The court found that the constitutional requirements were satisfied on the basis of the following contacts: (a) Trepel's brief stopover in Denver, Colorado, in November 1974 three months before petitioner even existed; (b) petitioner's obligation under the Scott Field Agreement

to mail checks to respondent's headquarters which were located in Colorado; and (c) the reasonable anticipation that *respondent's* administrative duties under the contract—such as preparation of plans and accounting—would be performed largely in Colorado. The court further held that, in these circumstances, it was not unfair under Due Process for the District Court to assert jurisdiction over petitioner. The Court of Appeals rejected the District Court's consideration of the modern ease of mobility in determining the fairness of exerting jurisdiction under Due Process. (Appendix C at 35a-37a).

VI. REASONS FOR GRANTING THE WRIT

The decision of the Tenth Circuit misconstrues and conflicts with the principles of this Court's recent decisions regarding the Due Process limits on long-arm jurisdiction. Additionally, the decision raises important and recurring questions concerning the limits imposed by Due Process on the exercise of *in personam* jurisdiction over nonresident defendants in commercial contractual contexts. These questions have not previously been resolved by this Court and have created confusing and inconsistent results in lower courts. The decision confers jurisdiction over any nonresident defendant who contracts with a party resident in the forum state without regard to where the contract is negotiated or executed, where it is to be performed or where the defendant's actions are taken.

A. *The Case Conflicts with this Court's Recent Decisions on the Due Process Limits of Long-Arm Jurisdiction.*

Although jurisdiction in this case is based upon a Colorado statute, the Court of Appeals held that the state statute conferred jurisdiction to the limits allowed by federal Due Process.[3] Therefore, the Court of Appeals' decision was based solely on federal constitutional limits on *in personam* jurisdiction.

The Court of Appeals' analysis of petitioner's contacts with Colorado purports to rely on three factual findings. Of these, only the first, Trepel's stopover in Denver, involves any activity of anyone related to the petitioner in the forum state, but neither the District Court findings nor the record support the assertion made by the Court of Appeals that Trepel "orally agreed to the terms of the Scott Field contract" in Denver. (Appendix C at 36a). The other two findings relate to the activities of *respondent,* not petitioner, and under decisions of this Court are wholly insufficient to support jurisdiction over the petitioner in Colorado consistent with the Due Process clause.

With respect to Trepel's trip to Colorado in November 1974, the District Court did not find that Trepel or petitioner made any agreement regarding the Scott Field project while in Colorado. In fact, the Scott Field Agreement itself recites that the prior oral agreement on which it was based was entered into on February 18, 1975, by telephone, long after Trepel's one stopover in Colorado on November 20, 1974.

Therefore, it is beyond dispute that the only findings which could support the decision of the Court of Appeals pertain to the activities of respondent in Colorado. However, the contacts relied upon were primarily general business

[3]The Colorado courts have agreed with that interpretation. *Dwyer v. District Court,* 188 Colo. 41, 532 P.2d 725 (1975); *Safari Outfitters, Inc. v. Superior Court,* 167 Colo. 456, 448 P. 2d 783 (1969).

activities of respondent not peculiar to the Scott Field Agreement, and were not, in any event, actions in performance of the Agreement but rather were general administrative activities preliminary to the execution of the project in Oklahoma.

Thus, the decision clearly contravenes the recent decisions of this Court in *World-Wide Volkswagen Corp. v. Woodson,* 48 U.S.L.W. 4079 (U.S. Jan. 21, 1980) (No. 78-1078), and *Rush v. Savchuk,* 48 U.S.L.W. 4088 (U.S. Jan. 21, 1980) (No. 78-952). In *World-Wide Volkswagen* this Court reiterated its previous holdings in *Hanson v. Denckla,* 357 U.S. 235 (1958), and *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), that Due Process requires that there exist some "minimum contacts" between the *defendant* and the forum state for a court of the forum state to exercise personal jurisdiction over the defendant. The Court's analysis in *World-Wide Volkswagen* centered wholly upon the defendants' actions in or related to Oklahoma and set aside the plaintiffs' admittedly substantial connection to the forum state.

This case presents an exercise of *in personam* jurisdiction over a nonresident defendant where the *only* volitional act of the defendant to avail "itself of the privilege of conducting activities within the forum State," *Hanson v. Denkla,* 357 U.S. 235, 253 (1958), was the brief visit of Trepel to Denver three months before petitioner was even incorporated, a visit which generated no finding by the District Court of the initiation of a contract or the reasonable anticipation of petitioner as to jurisdiction of the forum state. In *World-Wide Volkswagen,* the Court required the presence of "affiliating circumstances" of defendants' contacts with the forum state that are totally absent here. In language directly applicable to the present case, this Court stated:

> [W]e find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry on no activity whatsoever in [Colorado]. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of [Colorado] law. They solicit no business there either through sales persons or through advertising reasonably calculated to reach the State .... In short, respondents seek to base jurisdiction on one isolated occurrence and whatever inferences can be drawn therefrom ....

World-Wide Volkswagen Corp. v. Woodson, 48 U.S.L.W. 4079, 4082 (U.S. Jan. 21, 1980) (No. 78-1078).

The Court of Appeals' decision in the present case also relied upon a conception of "foreseeability" specifically rejected by this Court in *World-Wide Volkswagen*. The court below contended that petitioner should have anticipated that *respondent* would perform certain administrative duties under the Agreement in Colorado. Under the *World-Wide Volkswagen* holding, the only proper use of "foreseeability" in this context is whether "the *defendant's* conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* (Emphasis added). Under that test, the Court of Appeals would have been required to reverse the holding of the District Court since there was no finding that either Trepel or petitioner did anticipate or should have anticipated being haled into court in Colorado for any alleged breach of the Scott Field Agreement merely by reason of Trepel's stopover to execute an unrelated contract in November 1974.

B. *The Case Raises Important and Recurring Questions Concerning the Due Process Limits of* In Personam *Jurisdiction in Commercial Contractual Contexts.*

The Court's current docket contains at least five pending certiorari petitions or appeals raising the issue presented in this case in one form or another, reflecting the frequency with which the issue arises, the diversity of the contexts in which it arises and, in particular, the importance of this issue to the commercial world. *Blamey v. Brown, petition for cert. filed,* 47 U.S.L.W. 3498 (U.S. Jan. 11, 1979) (No. 78-1100); *Uniroyal Englebert Belgique, S.A. v. Connelly, appeal filed,* 48 U.S.L.W. 3001 (U.S. June 25, 1979) (No. 78-1914); *Lakeside Bridge & Steel Co. v. Mountain State Construction Co., Inc., petition for cert. filed,* 48 U.S.L.W. 3154 (U.S. Sept. 5, 1979) (No. 79-376); *Eschmann Bros. & Walsh, Ltd. v. V. Mueller & Co., petition for cert. filed,* 48 U.S.L.W. 3242 (U.S. Sept. 27, 1979) (No. 79-517); and *Home Federal Savings and Loan Ass'n. v. Chemical Realty Corporation, appeal filed,* 48 U.S.L.W. 3259 (U.S. Oct. 2, 1979) (No. 79-546). Additionally, a brief review of the digests and reporters would reveal literally hundreds of decisions by state and federal courts on this subject. Quite clearly, the extent of Due Process limits on states exerting *in personam* jurisdiction over nonresident defendants is exceedingly difficult and constantly recurring.

The *World-Wide Volkswagen* and *Rush* decisions arose in the context of personal injury actions, but there is a great need for further guidance by the Court on this issue in other contexts.

For example, the decision and analysis of the Seventh Circuit Court of Appeals in *Lakeside Bridge & Steel Co. v.*

Mountain State Construction Co., Inc., 597 F. 2d 596 (7th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3154 (U.S. Sept. 5, 1979) (No. 79-376), a contract case, is inconsistent with the decision of the court below in this case. The contacts of defendant with the forum state in *Lakeside Bridge* were the ordering of goods which were to be manufactured in the forum state and the acceptance of the purchase order by plaintiff in the forum state. All other dealings between the parties were either by interstate mail or telephone or by the plaintiff's travel to the defendant's place of business. On these facts, the Seventh Circuit found that the "minimum contacts" test had not been met. *A fortiori,* in this case, there was essentially one contact between the defendant and Colorado, the visit of Trepel to Colorado for unrelated reasons three months prior to the formation of petitioner. Moreover, the Agreement was to be performed in Oklahoma, not Colorado, and the Agreement was finally accepted in Michigan. The contacts of petitioner with the forum state in this case are even less significant than those existing in *Lakeside Bridge*. Nonetheless, the court below reached a result contrary to that of the Seventh Circuit Court of Appeals.

While these cases may not be clearly "conflicting," the differing results illustrate the great confusion that exists as to the practical application of the *International Shoe* standards in commercial contract cases.

To uphold the decision below would be to support jurisdiction in any state based on the plaintiff's presence, but not on any activity or necessary expectation of defendant with respect to the project to be undertaken. In the commercial world, an enterprise soliciting business outside its home state could sue in that state anyone with whom it contracts, and regardless of where the contract is made. Multistate companies could choose to sue in any state where, as in this

case, the company receives payments, pays invoices, executes documents or prepares plans. In any case, the defendant would be helpless to predict or limit the places where he could be sued and where he would have to be prepared for the expense and difficulty of defending a lawsuit. The resulting impact on commerce will be substantial since an enormous volume of commercial transactions in today's world are carried on over substantial distances and in numerous locatons.

A defendant should not be subjected to jurisdiction of a forum state on the basis of one brief stopover involving no negotiations or any other substantive discussion of the transaction at issue, and no actual contract making. In today's world, something more than the plaintiff's administrative actions or a defendant's fleeting stopover must be necessary to satisfy the minimum contacts test and to permit a distinction between transactions involving a significant action in the forum state and those that do not. Otherwise, as a practical matter, the "minimum contacts" test will be illusory and will provide no practical limitations on the exercise of long-arm jurisdiction by the states.

This Court should review this or one of the similar pending cases to provide guidance as to the quantity and quality of relationships necessary to meet Due Process requirements in the commercial contract context. If review is granted in one or more of the other cases, the Court should retain this case until guidance has been provided for the lower courts.

VII. CONCLUSION

For the reasons stated herein, petitioner respectfully prays that this petition for writ of certiorari be granted. In the alternative, this Court should retain jurisdiction over this action until it rules upon the other pending jurisdiction cases.

At the least, this case should be remanded to the Tenth Circuit Court of Appeals for reconsideration in light of *World-Wide Volkswagen Corp. v. Woodson* and *Rush v. Savchuk*.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75-F-667

CLEVEROCK ENERGY CORPORATION
an Indiana corporation,
Plaintiff,
v.
MARTIN TREPEL AND TREPEL PETROLEUM CORPORATION,
a Michigan corporation,
Defendants.

REPORTER'S TRANSCRIPT COURT RULING

Proceedings before the HONORABLE SHERMAN G. FINESILVER, Judge, United States District Court for the District of Colorado, beginning at the hour of 1:30 p.m. on the 21st day of April, 1976, in Courtroom D, United States Courthouse, Denver, Colorado.

APPEARANCES:

JOHN M. COGSWELL, Attorney at Law, 1660 Lincoln Street, Suite 2510, Denver, Colorado, appearing on behalf of the plaintiff.

RICHARD P. HOLME, Davis, Graham & Stubbs, Attorneys at Law, 2600 Colorado National Bank Building, Denver, Colorado, appearing on behalf of the defendants.

PROCEEDINGS:

THE COURT: I think the Court is prepared to rule on the several motions that are pending before us at this time. In regard to the long arm jurisdiction question, the Court would care to cite to counsel two cases that counsel have not cited to this Court and by shepherdizing just several of the cases, this would have surfaced and I believe it probably would have brought into focus the more current thinking of the Colorado Supreme Court. Now, this Court looks with great persuasion in regard to the pronouncement of judges on the Federal District Court. However, the Court also when it comes to an interpretation on state law, the Court continuously endeavors to monitor what is being done by the Colorado Supreme Court in its interpretation of Colorado Statutes and had the *Safari* case been shepherdized or if *Circle A Drilling* had been shepherdized, the Court is satisfied that two rather persuasive cases would have surfaced, and I think proper scholarship would have dictated that these cases be cited to the Court. *Van Schaack & Co. vs. District Court,* 538 P.2d 425, a 1975 case by the Colorado Supreme Court. The other case being the case of *Giger vs. District Court*, 540 P.2d 329, which are the latest pronouncements in this whole area. We are satisfied that we have jurisdiction. We are satisfied that there are probably four controlling criteria. One which is first the defendant must purposely avail himself or itself or the privilege of acting in a foreign state or causing important consequences in that state. Secondly, the cause of action must arise from the consequences in the foreign state. Defendant's activities and another element of consideration is the activity of defendant or the consequences of those activities must have a substantial enough connection with the foreign state to make the exercise of the jurisdiction over the defendant reasonable. I think the fourth caveat is the aspect of fairness and is there any unfairness or impropriety requiring the defendant to come into this foreign state and litigate this matter. We are satisfied that there is no element of unfairness with the ease of mobility today and considering that this state does have contact with the transaction, we could show no unfairness in requiring the defendant that was served under the long arm statute from litigating this matter in this Court.

So for a totality of those reasons, we are satisfied that we have jurisdiction and any motion attacking this is expressly denied.

In this connection, we note that plaintiff has submitted the affidavit of Dan Cleveland who is a principal of Cleverock. He claims that there were negotiations, discussions in Colorado, that the contracts were all with Trepel individually and as to the Scott Field, that contract was later assigned to TPC. I believe that it is arguable anyway that TPC took the contract, under Cleveland's portrayal of the facts anyway, with a Colorado implication. I believe there are certain analogies in this factual situation the *Giger* mandate and *Van Schaack* mandate. In this connection we are satisfied that likewise the overall question of summary judgment should be denied. There are substantial and material issues of fact and the movant is not entitled to judgment as a matter of law under Rule 56 of the Rules of Civil Procedure. So accordingly we are denying Defendants' Motion for Summary Judgment on the grounds of personal jurisdiction and on the broader question that we feel there are bona fide issues of fact.

* * *

REPORTER'S CERTIFICATE

I, E. J. CARPENTER, Certified Shorthand Reporter and Official Reporter to this Court, do hereby certify that I was present at and reported in shorthand the proceedings in the foregoing matter; that thereafter my shorthand notes were reduced to typewritten form under my supervision, comprising the foregoing official transcript; further, that the foregoing official transcript is a full and accurate record of the proceedings in this matter on the date set forth.

DATED at Denver, Colorado, this 11th day of May, 1976.

My Commission expires December 4, 1977.

/s/ E. J. Carpenter

E. J. Carpenter
Official Reporter

APPENDIX B

IN THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 75-F-667

CLEVEROCK ENERGY CORPORATION, an Indiana corporation,
Plaintiff,
v.
MARTIN TREPEL and TREPEL PETROLEUM CORPORATION, a Michigan corporation,
Defendants.

MEMORANDUM OPINION AND ORDER

Judge Sherman G. Finesilver:

This contract action involves two claims for relief by plaintiff CleveRock Energy Corporation, an Indiana corporation [CleveRock], against defendants, Dr. Martin Trepel of Michigan and Trepel Petroleum Corporation, a Michigan corporation [TPC]. CleveRock alleges breaches of contract and damages under agreements for oil and gas exploration in (a) Delores County, Colorado, (Dove Creek Well)[1] and (b) Oklahoma exploration (Scott Field Project).

As a defense and counterclaim to the Dove Creek claim, Trepel contends CleveRock owes him damages resulting from breaches of the Dove Creek contract and he is entitled

[1]Dove Creek well is the subject of the First Claim for Relief; the Scott Field Project is embodied in the Second Claim for Relief.

to rescind the contract on account of fraud and misrepresentation.

On the Scott Field claim, by way of defense and counterclaim, TPC asserts damages as a result of a breach of a verbal agreement between it and CleveRock. Trepel denies personal liability on the Scott Field matter.

We find that Trepel has breached the Dove Creek contract and TPC breached the Scott Field contract and their defenses and counterclaims are not well taken. Trepel has no personal liability for breach of the Scott Field contract.

Our findings of fact and conclusions of law follows [sic]:

DOVE CREEK WELL

I.

CleveRock and Trepel entered into a contract dated November 20, 1974, whereby CleveRock agreed to drill the Dove Creek oil well. CleveRock claims damages for breach of contract by Trepel in the amount of $62,511 less credit of $3,560; further, payment for interest, legal fees and expert witness costs. The November 1974 agreement gives rise to this lawsuit.

CleveRock, formed in 1973, was in the business of exploration and development of oil and gas prospects in the Rocky Mountain and Western part of the country. Dan Cleveland was president of the company and chief officer. He was a petroleum engineer and had over 20 years of experience in the oil and gas industry.

One of CleveRock's holdings was a farmout agreement[2] whereby CleveRock was assigned a 49% working interest in the Dove Creek Well, and CleveRock together with Mesa Petroleum Co. agreed to handle the drilling operation and to pay for whipstocking the Dove Creek Well, for which it was to earn 37% working interest and about 29% net revenue interest (interest in the gross production). The well to be whipstocked had formerly been drilled by Mobil Oil Corporation (KK well) in December 1973. The well had been drilled near a successful well (FF well).

Whipstocking is a drilling technique that utilizes (a) a previously drilled well hole, (b) cutting a vent or window in the metal casing surrounding the hole and inserting special drilling equipment to drill at an angle, (c) completing the hole at an angle to further explore for oil and (d) exploration using the new hole.

Ultimately CleveRock sold 37½% of its 75% interest to Petroleum Development Corporation [Pedco] retaining a reversionary interest. CleveRock still had a 62½% interest. Following extensive discussion, an agreement was entered on November 20, 1974, between CleveRock and Trepel, whereby the latter acquired the remaining 62½% interest (of the 75% portion owned by CleveRock). Trepel made a prepayment of $43,658 pursuant to the terms of the contract.

In the November agreement, Trepel agreed to "bear and pay [his share of] the costs, risks, and expenses incurred in drilling, testing, completing, and equipping the test well." CleveRock agreed to commence drilling and whipstocking

[2]A farmout agreement in the oil and gas industry is an arrangement whereby the owner of an oil and gas interest (farmor) agrees that another party (farmee) will be given an interest in the oil and gas holding if the farmee drills the well in a designated area and complies with other contractual requirements between the parties.

the Mobil "KK" well on or before December 31, 1974, agreed to conduct operations with due diligence and in a workmanlike manner, in conformance with good industry practice, and agreed to drill the well to the depth sufficient to test the geological formation (where oil had been found on the successful Mobil "FF" well on adjoining property). CleveRock agreed to provide engineering and reports, and material in connection with the drilling of the well, including a document widely used in the industry and referred to as AFE (authority for expenditures). The AFE set out the estimated costs of drilling and completing or abandoning the well and had previously been prepared on the well in question.

The November agreement includes specific representations by Trepel as follows: that he had received no written or oral data, projections or promises to induce him to enter into the agreement other than those in a separate letter previously sent to Trepel and acknowledged by him; that Trepel acknowledged that the compensation in the agreement was fair and reasonable and he had received all information deemed necessary for him to make an informed investment decision; and further, that he could have an independent consultant or other person of his choice examine and make recommendations with respect to decisions to be made by Trepel under the agreement and need not rely on recommendations of CleveRock.

CleveRock commenced drilling the Dove Creek well on January 31, 1975 (drilling was originally to commence in December). The operation was beset by problems including a harsh winter affecting drilling schedules, troubles encountered during the whipstock operation and large cost overrides.

After a period of drilling, the oil production in the well was not successful and oil in commercial quantities not produced. Drilling ceased and money was lost in the transaction. The actual cost to drill and complete the unsuccessful well was about $141,522. In this action, CleveRock seeks to recover Trepel's share of the drilling costs as provided for in the contract.

II.

Trepel, by profession, is a doctor of osteopathy. However, for a period of time before the November 1974 agreement he was actively involved in the oil and gas business and had invested over one million dollars between 1964 and 1974 in various oil investments. He had taken special courses and attended seminars in this field of business activity. He was the organizer of Trepel Petroleum Company during the relevant period, and was in the process of forming a syndication for oil and gas ventures having a potential investment portfolio of two million dollars. The evidence is clear that Trepel reviewed offering circulars relating to the oil and gas industry; was familiar with the exingencies [sic] and risks of the oil and gas business; knew terminology and technical aspects of drilling operations; frequently consulted with engineers and persons familiar with oil drilling; and was knowledgable [sic] about financing oil and gas ventures.

Trepel was an experienced, sophisticated financial investor possessing considerable business acumen. His arrangement with CleveRock was completed by Trepel in a methodical, step-by-step analysis of potential financial returns with attendant risks that were clearly apparent in that type of venture.

It is significant that Trepel was in a high tax bracket and the evidence reflects that he was anxious to have the November 1974 agreement executed expeditiously so that he could utilize his 1974 Dove Creek investment for federal tax purposes. This objective was accomplished.

III

Notwithstanding his experience in the oil and gas industry, Trepel asserts that he is not liable for additional sums incurred in the Dove Creek project because he was induced to sign the agreement by fraud and misrepresentation of CleveRock. Trepel also claims no breach of contract.

Trepel has failed to establish his claim of fraud and misrepresentation on the execution of the original November 1974 contract or extensions thereto. Trepel has failed to establish that CleveRock acted with reckless disregard of the truth. The evidence is also clear that CleveRock is entitled to damages for breach of contract by Trepel.

Fraud and misrepresentation as interpreted by the Tenth Circuit Court of Appeals has been expressed in these terms: concealment or misrepresentation of a material fact by the perpetrator; indifference or knowledge of the misrepresentation by the perpetrator; representation or concealment made with the intention that it be acted upon; action on the misrepresentation or concealment resulting in damages and immediate action by the alleged victim of the fraud when evidence of fraud surfaces (not sitting on one's rights). *See Koch Industries, Inc., v. Vosko,* 494 F.2d 713 (10th Cir. 1974); *Venture Investment Co., v. Schaefer, et al.,* 478 F.2d 156 (10th Cir. 1972); *Dempsey Tegler & Co. v Otis Oil and Gas Corp.,* 293 F. Supp 1383 (D.Colo. 1968).

Colorado cases have held the following requisites must be established to prove fraud: there was a false representation of a past or present fact; that this was a material fact; the misrepresentation was made without an honest belief as to its truth; it was made with the intent to deceive; it was justifiably relied upon; and there was damage proximately caused by the misrepresentation. *See McNeill v. Allen,* 534 P.2d 813 (Colo. App. 1975); *Stalos v. Booras,* 528 P.2d 254 (Colo. App. 1974); *Gomogda v. Prudential Inv. Co.,* 50 P.2d 756 (Colo. App. 1972); *Bemel and Associates, Inc. v. Brown* 435 P.2d 407 (Colo. 1937); *Morrison v. Goodspeed,* 68 P.2d 458 (Colo. 1937).

Under the criteria expressed by the Tenth Circuit Court of Appeals and Colorado State Courts, fraud or misrepresentation has not been established by Trepel. There has been no concealment or misrepresentation of material facts by Cleveland. Statements made by Cleveland were, in his educated judgment, truthful, and he had no intention to deceive. Trepel had full opportunity to review field and final log reports, drilling records of "KK" well and Mobil Oil's recovery therefrom, and extensive geological reports in the oil and gas fields in question.

Trepel's claim of fraud is ill-fitting and lately timed in light of the fact that all necessary documents needed for a person of Trepel's experience to make a business judgment were personally made available to him in the negotiating phase of dealings in the Dove Creek transactions, and were also made available to Trepel's agent, Peter Burnett. Trepel did not seek additional information and documentation from Cleveland, but consulted with his own expert, Burnett, as to evaluation of the project.

Burnett, an experienced consulting engineer, initially was looking into the venture for Field Enterprises, Chicago, but thereafter passed on his knowledge and analysis to Trepel. Contrary to the position of Trepel, Cleveland made full disclosure of all facets of the venture to Trepel and Burnett. Prior to his contact with Trepel and Burnett, the evidence clearly reflects that meticulous steps were taken by Cleveland in analyzing the vast material in order to determine whether CleveRock should become involved with the venture. Cleveland also consulted with other experts in the field. CleveRock stood to lose considerable time and money if the venture failed.

Trepel cannot extricate himself from the stark reality that he entered into the contract on the basis of information he received from Burnett, full information made available to him by Cleveland and his own experience and knowledge of the realities and speculative aspects of the venture.[3]

Trepel principally alleges the following misrepresentations:

1. Trepel's share of the drilling expenses would be about $42,500.

2. Trepel's net profits would be approximately five times his portion of the cost of drilling the well, but not less than three times his portion of the cost of drilling the well;

3. That the daily drilling costs would not exceed $1,800 and that the number of drilling days would not exceed ten;

[3]In his testimony, Burnett said of Trepel that Trepel "had experience in oil and gas ventures, he was knowledgeable in this field. He could fend for himself."

4. That there was a 90% success factor in the drilling operation;

5. That Trepel's investment in the venture would be successful; and

6. CleveRock failed to supply Trepel with drilling and log reports as drilling progressed.

The persuasive evidence establishes that CleveRock never put a ceiling on the total amount of drilling expenses and never assured Trepel that his share of the total expense would be in the $43,000 range. Both Cleveland and Burnett fully informed Trepel of the strong possibility of cost overruns and that drilling costs and expenses were rapidly rising. We have considered and reject Trepel's argument that the AFE of Pedco (another joint venturer in the project), showing estimated total drilling costs at $85,000, was a guarantee of the total drilling expenses. By its terms the AFE is an estimate opinion of costs without binding effect in the industry. The figure of drilling costs expressed by Cleveland was based on good faith belief, was reasonable and was made by Cleveland without any intent to deceive Trepel. Underscoring the bona fides of Cleveland's belief, we note that other engineers made similar estimates. In the context of the totality of the evidence, Trepel could not justifiably rely on the $43,000 figure.

We reject Trepel's contention that fraud or misrepresentation is present because drilling costs exceeded the original estimate. A firm commitment was never made as to the upper limits of daily drilling costs. Admittedly, CleveRock made a late start in its drilling activity and used a different drilling rig than originally contemplated. The original estimate contemplated was 10 drilling days. The larger rig cost

$2640 per day rather than $1800 as set forth in Pedco's AFE. The use of the larger rig was a management judgment of CleveRock and while it resulted in more expense, the totality of the transaction was reasonable and did not involve any intention to deceive by Cleveland. Trepel made no objection to the amount until many months after the transaction and he voiced no objection when initially informed of the additional expense.

Cleveland testified that it was his belief that the larger rig was preferable for winter drilling, and a shortage of rigs was prevalent in the area. Drilling expenses exceeded the AFE estimate, but were not so exorbitant as to suggest bad faith or fraud on Cleveland's part. According to Cleveland's testimony, drilling endeavors increased by 5 to 8 drilling days to [sic] the 10 days originally represented by Cleveland. As noted, the drilling expense was not a material fact in the over-all transaction.

The totality of the evidence indicates that the late drilling start commencing in early 1975 (drilling was to start before December 31, 1974) was acquiesced in by Trepel and he agreed to the use of the more expensive rig. (Agreement signed by Trepel on January 20, 1975).

Thus, Trepel waived objections in these matters. If Trepel believed them to be critical he had a duty to remonstrate in an expedient way. This he failed to do.

We have considered and reject Trepel's claim of fraud because of lateness of receipt of log and drilling reports from CleveRock. These reports were not relied on by Trepel and he slept on his rights by not insisting on timely transmittal of the reports, if they were late as alleged but not proved by the evidence. The evidence is in conflict as to the timetable of

transmittal of the reports by CleveRock and receipt by Trepel. After signing the November contract, Cleveland and Trepel were in frequent contact with both Dove Creek and Scott Field matters, and every opportunity was present for Trepel to make inquiry as to the drilling progress or voice criticism about the lateness of reports or questionable items. Trepel's record keeping did not lend itself to accuracy in chronicling receipts and documents from CleveRock. Fraud has not been established in this phase of Trepel's defense. In no particular, were the acts or statements of Cleveland done with intent to defraud. The matters alluded to by Trepel were not material aspects of the contract, and as outlined above, the alleged fraudulent statements or representations were not generally relied upon by Trepel.

We find from the evidence that Trepel was constantly kept abreast of progress in the drilling operation including cost overruns. No aspect of the project was withheld by CleveRock. There was no overreaching by Cleveland in his dealings with Trepel and experienced oil and business men personified by Cleveland and Trepel were privy to the transactions.

A range of financial recovery in the venture was discussed between Cleveland and Trepel, but to no degree was it committed by Cleveland as a fact, nor was there any guarantee of a recovery. Cleveland expressed recovery and success of oil production in the well as estimates, not facts. Trepel has failed to carry his burden that he was assured of a particular recovery. In *Ballard & Cordell Corporation v. Zoller & Danneberg,* 544 F.2d 1059 (10th Cir. 1976); *cert. den.*, ____ U.S. ____, 45 U.S. L.W. 3806 (June 14, 1979) fraud was alleged. The Court found that a petroleum engineer's evaluation of the future productivity of a well was

opinion, not fact. The case holds that a fraud claim could not stand where the same engineering data was available to both parties to a drilling contract. The case further held that the evaluations of the technical data involved (gas pressures), are not customarily exchanged between parties and that there is no duty on a prospective seller or buyer to disclose opinions of their respective experts. The alleged misrepresentation here which Dr. Trepel is relying on is no different than the one found to be unavailing in the *Ballard* case.

We reject Trepel's fraud claim that he was assured of a substantial new profit (five times his portion of the costs of drilling the well, but not less than three times that cost).

The evidence is in conflict whether a 90% success figure is unreasonable. Opinion evidence was presented at trial that supports the reasonableness of that figure. Thus, in the opinion of some of the experts who testified, the estimates were reasonable.

Before he went into the venture with CleveRock, Trepel had the same information at hand as that utilized by CleveRock. Trepel had full knowledge that Mobil had struck out in developing the well in commercial oil quantities, further that whipstocking is a risky and speculative undertaking. In addition, we note that Trepel pointed up the speculative nature of oil exploration drilling in his offering materials for syndication of Trepel Petroleum Corporation.

Projections of petroleum productivity in a given oil well is an inexact science beset with countless unknowns. Discussions or written correspondence between Cleveland and Trepel dealing with productivity are expressions or opinions and estimates. They are not factual and do not give rise to a

fraud action -especially, as here, when the same information for an informed decision is made available to all parties.

We are impressed with the fact that Cleveland discussed potential productivity based on his honest belief as to its truth and no intent to deceive has been established.

Trepel has failed to establish that he justifiably relied on the alleged fraud and misrepresentation.

Trepel adduced testimony that whipstocking should not have been undertaken in the first place. However, Trepel knew of the whipstocking drilling approach before he made his investment and with full knowledge of the facts and availability of pertinent material he signed the November agreement.

III.

We find no fraud or misrepresentation established by Trepel against CleveRock.[4] To the contrary, CleveRock has established breach of contract by Trepel and CleveRock has been damaged in the amount of $58,950 under the terms of the contract plus per diem interest. We reject CleveRock's claim for attorney fees and expert fees.

CleveRock has failed to establish entitlement to these fees and evidence in the record does not establish reasonableness of fees and legitimate apportionment between Dove Creek and Scott Field matters.

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[4]We likewise find that Trepel has failed to establish grounds for rescission of the contract.

CLEVEROCK'S SCOTT FIELD PROJECT

I.

During the time in November 1974 that negotiations between Cleveland and Trepel were in progress on the Dove Creek Well, there was considerable discussion about the Scott Field Oklahoma project. The project involved a joint development of a Scott Field water flood project involving oil and gas exploration. Trepel orally agreed to invest in one half of the Scott Field project subject to study and final recommendation by Trepel's consultant, Burnett. Under the agreement, Trepel was to pay $150,000 for 50% interest and he was to pay 50% of the development costs and CleveRock would be entitled to a 25% working interest after Trepel recovered his development costs.

Negotiations on the Scott Field transaction continued into February 1975. At one point in early February 1975, Cleveland attended a meeting in Detroit, Michigan, with Trepel and several of his prospective business associates and legal and other advisors. At this point, Cleveland learned of Trepel's plan to form a petroleum corporation and syndication of oil and gas prospects including the Scott Field Project. Plans were in progress for setting up a Michigan corporation for syndication purposes and preparing an offering circular.

The Scott Field project was discussed at the meeting and Trepel acknowledged to Cleveland his agreement to invest in the project; further, that Cleveland would have his money under the agreement by April 1, 1975. Cleveland informed Trepel that a written agreement on the project was necessary.

Upon his return to Denver, at Cleveland's direction, an

attorney drafted an agreement on the project and forwarded it to Trepel on February 21, 1975.

The agreement provided for a payment of $177,750 by Trepel before April 1, 1975. At the request of Trepel's lawyer, the contract referred to the parties as CleveRock and Trepel Petroleum Corporation (rather than Trepel individually);[5] also, the payment date was extended to April 25, 1975. The agreement binding CleveRock and TPC was dated March 4, 1975, and executed by TPC on March 7, 1975. As noted, the contract called for payment by TPC of $177,750 on or before April 25, 1975, and a binding commitment to pay an additional $526,250 upon invoice in order to own a 50% interest in Scott Field. Through letter correspondence, the payment of $177,750 was reduced to $100,000 to make the project more appealing to investors.

After execution of the contract, Trepel endeavored to place all or a part of his interest with other investors; he also made contacts with eastern investment and brokerage houses.

At the request of Trepel in April 1975, Cleveland went to Detroit a second time and met with Trepel and Stanley Berger, a friend and business associate of Trepel's. Advisors and bankers close to Trepel were also present. Part of the discussion of the meeting involved a possible modification of the contract. The testimony is in conflict as to what was discussed or what modifications as to a payment timetable, if any, were agreed upon.

We find that while modifications were discussed, no modifications were effectuated and the March contract provisions remained intact; further, that no agreement was reached to extend the time for payment under the contract.

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[5]We reject CleveRock's claim that Trepel was personally liable on the contract.

At the meeting, Cleveland emphasized the need for immediate financing for expeditious commencement of the project; that operational costs were increasing, drilling commitments had been made, interest costs were involved, restaking expenses were present and further, that Scott Field was an important holding in CleveRock's holdings' portfolio.

After the meeting, Trepel continued in his efforts to attract investors in Scott Field. While the testimony is in conflict, we find that Trepel never had a binding agreement from Cleary Petroleum or any other investor to assist his financial commitment in Scott Field. Cleary's potential involvement is speculative as the venture had previously been turned down by them.

During April, 1975, it became evident that Trepel was refusing to pay its share of drilling costs on the Dove Creek project. Cleveland informed Trepel in late May, 1975, that because of Trepel's procrastination on Dove Creek and the immediate need for development of Scott Field, that Cleveland had to look for other financing on the latter project. Trepel made no prtestations in [sic] the intended activity of Cleveland to protect development of Scott Field. CleveRock kept the contract open until the middle of May for TPC to perform. TPC sat on its rights under the contract, and CleveRock placed Scott Field pr[illegible]ect elsewhere in late August, 1975. Drilling commenced in September, 1975. CleveRock had not placed the deal with anyone else prior to August 1975, even though representations to the contrary were made by CleveRock to TPC.

CleveRock claims that TPC breached the Scott Field agreement by failing to pay the $177,750 due on April 25, 1975. It is unrefuted that the amount was not paid. We find

the TPC was afforded a reasonable period of time to comply with the contract.

The Scott Field contract meets all the requisites of a valid contract and its terms and conditions are binding on the parties. TPC never performed under the contract and breached the contract. We reject the contention of TPC that 28 days to comply with payment requirements under the contract is unreasonable (April 25, 1975 to May 23, 1975). Throughout their dealings, CleveRock emphasized exigencies [sic] of time and the time limits to comply were not open-ended.

TPC alleges that it had reasonable time beyond April 25, 1975 within which to pay the $100,000. However, at no time did TPC even tender that or any other amount in furtherance of its contractual responsibilities.

II.

While we have found defendant TPC has breached the Scott Field contract, CleveRock has failed to prove damages under the contract. The project was placed with other investors (Resources Investment Corp.) by CleveRock in August 1975, and we are unable to glean any valid recoverable damages to be awarded to CleveRock proximately caused by TPC's breach. We note that in plaintiff's Proposed Findings of Fact and Conclusions of Law filed on August 11, 1977, plaintiff recites damages on the Scott Field project in the sum of $103,900. The damages are itemized as follows:

(a) Additional surveying and engineer costs	$ 5,000.

(b)	Loss of rapport or good will and damage to its reputation	50,000.
(c)	Additional interest expense	3,500.
(d)	Loss of income	5,000.
(e)	Loss of time	4,000.
(f)	Additional drilling expense	36,400.
	Total	$103,900.

At trial, because of the vagueness of the testimony on damages resulting from TPC's breach of contract and at the request of the Court, CleveRock submitted an itemization of damages (plaintiff's Exhibit 80). This itemization reflects the following:

1.	Cash due CleveRock under March 4, 1975 agreement	$177,750
2.	Less cash received from Resources Investment Corp.	92,118
3.	Less value of ORI received under Resources contract per Cleveland testimony based on 725,000 bb oil and $11.50 oil (less)	56,920
4.	Plus total drilling depths at Scott Field drilled in development at 1.00 per foot.	36,400
	Total	$ 65,112

There is no harmony in amount, basis or method of calculation in the two itemizations, nor is credible evidence present as to damages suffered by CleveRock on the Second Claim for Relief.

We find that CleveRock has failed to carry its burden of proof in establishing damages proximately caused by TPC's breach of the Scott Field contract. In addition, Cleveland testified at trial that calculation of damages set forth in plaintiff's Exhibit 80 was erroneous. The testimony on the question of damages was vague, inaccurate, conjectural and speculative.

Thus, defendant TPC is entitled to judgment on the Second Claim for Relief and dismissal of the complaint. However, under the facts, we have found a contract to exist and conclude that based on the facts as a matter of law the counterclaim of defendant TPC is without merit and should be likewise dismissed with prejudice.

CONCLUSIONS OF LAW

Under the facts as found by the Court, the Court concludes as to the First Claim for Relief (Dove Creek Project) as a matter of law that CleveRock was not guilty of fraud or misrepresentation; that there was a legal contract between the parties that was breached by defendant Trepel; that the other defenses of defendant Trepel heretofore set forth are without merit and plaintiff is entitled to judgment.

Under the facts as found by the Court, the Court concludes as a matter of law that the counterclaim of defendant and request for rescission of the contract are without merit and should be dismissed with prejudice.

As to the Second Claim for Relief (Scott Field), we conclude that a contract existed between the parties, it was breached by defendant Trepel Petroleum Corporation but that plaintiff has failed to establish damages as a proximate cause of the breach. Thus, the Court concludes as a matter of law that the complaint of plaintiff, CleveRock and counterclaims of defendant Trepel Petroleum Corporation are without merit and should be dismissed with prejudice.

ORDER

On the First Claim for Relief, the issues are joined in favor of plaintiff, CleveRock Energy Corporation, and against defendant, Martin Trepel, for $69,771[6] plus per diem interest at the rate of $12.92 for each day after August 15, 1977 (interest at 8% on all invoice amounts); further, on the Second Claim for Relief, the complaint of plaintiff, CleveRock Energy Corporation, is dismissed and the counterclaim of defendant, Trepel Petroleum Corporation, is dismissed, all with prejudice. On the Second Claim for Relief, the complaint against Martin Trepel individually is dismissed.

The Clerk of the Court shall enter judgments accordingly.

Costs in favor of plaintiff, CleveRock, to be taxed by the Clerk of the Court upon filing of a bill of costs. Plaintiff CleveRock is directed to compute interest hereunder and submit the same to the Clerk for inclusion in the judgment.

[6]Computed as follows: Total claim $62,511 less credit for salvage of $3,560 is $58,951. Interest at 8% per annum from due date of invoices to August 15, 1977 totals $10,820 - grand total is $69,771.

This Opinion and Order constitutes the Findings of Fact and Conclusions of Law as required by the Federal Rules of Civil Procedure.

DATED at Denver, Colorado, this 17 day of November, 1977.

BY THE COURT:

/s/ Sherman G. Finesilver

SHERMAN G. FINESILVER, Judge
United States District Court

APPENDIX C

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CLEVEROCK ENERGY CORPORATION,
Plaintiff-Appellee and Cross-Appellant,
vs.
MARTIN TREPEL and TREPEL PETROLEUM CORPORATION,
Defendants-Appellants and Cross-Appellees.

Nos. 78-1054
78-1055

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. Civil Case No. 75-F-667)

Jeffrey M. Proper of Leibsohn, Eaton, Gooding & Romley, Phoenix, Arizona (with Richard P. Holme of Davis, Graham & Stubbs, Denver, Colorado, on the brief) for Defendants-Appellants and Cross-Appellees.

Phillip C. Gans of Cogswell, Chilson, Dominick & Whitelaw, Denver, Colorado, for Plaintiff-Appellee and Cross-Appellant.

Before BARRETT, McKAY and LOGAN, Circuit Judges.

McKAY, Circuit Judge.

DOVE CREEK PROJECT

In its first count CleveRock Energy Corporation (CleveRock), an oil and gas developer, sued for breach of a contract relating to an oil development project in Dolores County, Colorado (Dove Creek Agreement). The district court found in favor of CleveRock and entered judgment against defendant Trepel, an investor, for the amount due under the contract.

FRAUD AND MISREPRESENTATION

By way of counterclaim, Trepel sought recission of the Dove Creek Agreement on the grounds of fraud and misrepresentation in inducing him to enter the agreement. The trial court found the absence of every element necessary to establish Trepel's claim. The court determined that (1) CleveRock's predictions about the viability of the project were not unreasonable; (2) the allegedly misrepresented and omitted information was either mere opinion or not material; (3) CleveRock had no intent to deceive and held an honest belief as to the truth of all statements; and (4) as an experienced oil and gas investor, Trepel could not have justifiably relied on any of the alleged misrepresentations or omissions. In addition, the court made a specific finding that Trepel was not entitled to recission because he sat on his rights. Trepel appeals each of these findings.

Trepel stresses particularly his view that intent to deceive is not a necessary element of a claim for recission on misrepresentation in Colorado. To the extent Trepel's claim is based on fraud theory, there is no dispute that CleveRock's honest belief and lack of intent to deceive renders Trepel's claim impotent under Colorado law. *See McNeill v. Allen,* 534 P.2d 813, 818 (Colo. App. 1975); *Stalos v. Booras,* 34

Colo. App. 252, 528 P.2d 254, 256 (1974); *Bemel Associates, Inc. v. Brown,* 164 Colo. 424, 435 P.2d 407, 409 (1967); *Morrison v. Goodspeed,* 100 Colo. 470, 68 P.2d 458, 462 (1937). We need not reach the question whether scienter is necessary in a pure recission case because we are satisfied that the allegedly misrepresented and omitted information was either immaterial or opinion on which Trepel could not have legal reliance.

The standard for appellate review was reiterated in *Joyce v. Davis,* 539 F.2d 1262 (10th Cir. 1976):

> Findings of the trial court will not be disturbed on appeal unless they are held to be clearly erroneous . . . Appellate courts do not try factual issues de novo . . . On appeal we must view the evidence and all reasonable inferences therefrom in the light most favorable to the prevailing party.

Id. at 1264.

In applying this standard, we consider, first, CleveRock's representations during contract negotiations that the probable drilling costs would be $61,000 for a dry hole and $85,000 for a commercial producer, and that there was a 90% chance of success on the project. The district court made the following findings based on ample evidence in this record: (1) CleveRock refused to put a ceiling on the total amount of drilling expenses and never assured Trepel that his share of the total expenses would be in the $43,000 range; (2) that both Cleveland, CleveRock's president, and Burnett, Trepel's advisor, informed Trepel of the strong possibility of cost overruns, and that drilling costs and expenses were rapidly rising; (3) that the source for the figures given Trepel, the AFE (authority for expenditures), was an estimate of costs without binding effect in the industry; and (4) that Trepel, an experienced and knowledgeable oil and gas

investor,[1] had in hand the same information utilized by CleveRock in evaluating the potential productivity of the well. Record, vol. 3, at 594-98. It is generally recognized that success and cost figures for oil and gas drilling ventures must, in the present state of the art, be estimates, opinion, and predictions of future exigencies, none of which is actionable in Colorado. *See, e.g., United Fire & Casualty Co. v. Nissan Motor Corp.*, 164 Colo. 42, 433 P.2d 769, 771 (1967); *Leece v. Griffin*, 150 Colo. 132, 371 P.2d 264, 265 (1962); *Bell Press, Inc. v. Phillips*, 147 Colo. 461, 364 P.2d 398, 400 (1961); *Slide Mines, Inc. v. Denver Equipment Co.*, 112 Colo. 285, 148 P.2d 1009, 1011 (1944). We can expect no less of a sophisticated investor experienced in the industry.[2]

Trepel argues, nonetheless, that opinions of *experts* may constitute misrepresentation. We agree that an expert exception to the opinion rule has been found, but conclude that the facts of this case do not come within its parameters. We consider it significant, as do the sources Trepel cites,[3] that Trepel and his advisor, Burnett, were given all of the basic

[1]The trial court noted that, among other things, Trepel had invested over a million dollars in various oil projects between 1964 and 1974. He had attended special courses and seminars and reviewed the offering circulars of oil and gas investment companies. He was acquainted with the terminology and technical aspects of the business and frequently consulted with engineers and others experienced in drilling. Record, vol. 3, at 592.

[2]Trepel argues at length that as a joint venturer with CleveRock he may rely on representations without investigating their truth. To the extent Trepel claims that this relationship establishes a higher or different standard than exists in misrepresentation cases generally, our finding regarding the scope of the pretrial order, *infra*, obviates any need for discussion of this theory. We note, however, that in an action for recission the alleged misrepresentations that form the basis of the claim must have induced the aggrieved party to enter the agreement. At this time, prior to entering the agreement, no relationship other than that of arm's length business negotiations existed between the parties. Trepel was not a joint venturer with CleveRock when he received the initial correspondence outlining the possibilities of the Dove Creek Project.

[3]*See, e.g.*, W. Prosser, *Handbook on the Law of Torts* § 109, at 726-27 (4th ed. 1971).

data upon which CleveRock made its projections, and that Trepel is experienced in the industry. Further, projections of success and cost in oil and gas exploration and drilling ventures are not broadly susceptible to uniform and reliable expert evaluation.

Trepel argues that even if CleveRock's success and cost estimates are not actionable, he should be able to rescind on the basis of certain omissions. CleveRock allegedly should have advised Trepel that the use of a larger rig would increase per day drilling costs above prior estimates, that commencing to drill one month deeper into the heart of winter than originally planned (January 31 rather than December 31) might increase costs, and that the east boundary line of the well site might become a problem should unanticipated technical difficulties be encountered. In short, it is argued that CleveRock should have made additional estimates of how certain unknowns would affect his original imprecise estimates.[4] The trial court specifically held that the drilling expense was not material to the overall transaction[5] and that, indeed, CleveRock, in good faith, constantly kept Trepel abreast of the progress of the drilling operation including cost overruns. The court found from the totality of the evidence that the late drilling "was acquiesced in by Trepel and he agreed to the use of the more expensive rig." Record, vol. 3, at 596. These findings are not clearly erroneous.

[4]We observe that had CleveRock indeed attempted to make predictions concerning ultimate costs and the probabilities of future technical problems, these representations would have been prophecies of future exigencies not actionable under the Colorado authorities already cited.

[5]We are reminded that the "requirement of materiality is some assurance that the representee is not merely using the misrepresentation as a pretext for escaping a bargain that he is dissatisfied with on other grounds." Keeton, *Actionable Misrepresentation: Legal Fault as a Requirement: Recission*, 2 Okla. L. Rev. 56, 59 (1949).

FIDUCIARY DUTY

Trepel also charges as error the district court's exclusion from trial of a breach of fiduciary duty issue which the court perceived to be beyond the scope of the pretrial order. We agree that the pretrial order in this case is less specific than it might properly have been; however, the order is developed in sufficient detail to warrant the court's exclusion of this issue as a matter beyond its scope. This is particularly true where, as here, the party objecting to the narrower construction of the order failed to take timely advantage of an opportunity to enlarge upon the general terms used in the order.

This court is acutely aware of the evils of the inflexible application of a pretrial order. *See Case v. Abrams*, 352 F.2d 193, 195 (10th Cir. 1965); *Century Refining Co. v. Hall*, 316 F.2d 15, 19-20 (10th Cir. 1963). These evils are aggravated when the pretrial order is unrefined. We recently held that a coarse pretrial order could not be narrowly applied to exclude one of three subtheories fairly encompassed within its general terms. *Trujillo v. Uniroyal Corp.*, No. 77-1772 (10th Cir. 1979). However, we should not lose sight of the important policies behind the pretrial order mechanism — *i.e.*, the narrowing of issues to facilitate an efficient trial and to avoid surprise. *See Crist v. Goody*, 31 Colo. App. 496, 507 P.2d 478, 480 (1972).

In this case the Second Pre-Trial Order was filed on August 19, 1976, nearly a year after suit was first brought. The defendant laid out his claims as follows:

> (a) *First Counterclaim.* The Defendant Trepel contends that the Plaintiff is liable . . . as a result of the Plaintiff's breach of Exh. A [the Agreement]. The breaches complained of are set forth in paragraph VI.A.2 of this Second Pre-Trial Order . . .

> (b) *Second Counterclaim.* The Defendant Trepel contends that he is entitled to [recission] . . . as a result of certain alleged misrepresentations made by Plaintiff . . . The misrepresentations are set forth in paragraph VI.A.3 of this Second Pre-Trial Order. . . .

Record, vol. 2, at 250. In setting forth the specific breaches later in the order, in paragraph VI.A.2, Trepel included the following:

> (a) failing to commence redrilling the Dove Creek Well before the December 31, 1974 deadline imposed by Exh. A;
>
> (b) failing to furnish the Defendant Trepel with all of the notices, reports and information required under . . . Exh. A)
>
> (c) incurring expenses in excess of authorized amounts.

Record, vol. 2, at 252. Later in the order, Trepel listed under the same heading "Contested Issues of Fact" another general reference to breach:

> 6. Whether the Plaintiff breached any duties implied by law which he owed to Trepel in connection with Exh. A.

Record, vol. 2, at 254. This general phraseology appearing later in the order must be viewed in light of the specific lists given in paragraph VI.A.2. In addition, to avoid injustice, the trial court gave the parties a stated period in which they could file a "statement detailing with specificity each ground

of alleged breach, misrepresentation, waiver and estoppel asserted." Record, vol. 2, at 255. Nearly three months after this period had lapsed, and nearly a year after the pretrial order was entered, Trepel presented his First Further Specifications of Breaches and Non-performance, which contained the first reference to the breach of fiduciary duty theory. Record, vol. 2, at 271. We cannot in these circumstances conclude that the trial judge, who presided over the pretrial conferences of this extensive litigation and had before him the pleadings, motions and various pretrial statements of the parties, abused his discretion in striking the breach of fiduciary duty issue as beyond the scope of the litigation. *See James v. Newspaper Agency Corp.*, 591 F.2d 579, 583 (10th Cir. 1979); *Monod v. Futura, Inc.*, 415 F.2d 1170, 1173 (10th Cir. 1969).

COSTS

CleveRock seeks reversal of the trial court's determination disallowing as costs its attorney and expert witness fees attributable to the Dove Creek litigation. We agree with the trial court that CleveRock need not be allowed these expenses.

The Dove Creek Agreement, which itself does not refer to allocation of costs in case of litigation, incorporates the terms of the Operating Agreement only "[i]n the event that either of the parties hereto does not desire to participate in the completion of the test well." Record, vol. 1, at 7. Since this event did not occur and is, moreover, irrelevant to the litigation, whatever provisions the Operating Agreement may contain relating to CleveRock's right to attorney fees and expert costs are similarly irrelevant. There is nothing in the documents or the relationship of CleveRock and Trepel

which requires us to award CleveRock these litigation expenses.

In the absence of specific agreement between the parties, it is well settled that expert witnesses are entitled only to the regular statutory witness fees as part of taxed costs.[6] *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 284 U.S. 444 (1932); 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2678, at 236-37 (1973). This circuit has specifically held that the prevailing party is not entitled to excess fees for experts. *Euler v. Waller*, 295 F.2d 765, 766 (10th Cir. 1961). *See also Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 586-87 (10th Cir. 1962).

CleveRock seeks, in the alternative, to obtain its expert witness fees indirectly through 28 U.S.C. § 1920(4) which includes as taxable costs "[f]ees for exemplification and copies of papers necessarily obtained for use in the case." While CleveRock did not include its experts under this category in its Bill of Costs, it now contends the expert witness fees were an adjunct to the preparation of exhibits. We refuse to interpret § 1920 as a vehicle for circumvention of the established rule on expert witness fees. *See Frigiquip Corp. v. Parker-Hannifin Corp.*, 75 F.R.D. 605, 614 (W.D. Okla. 1976) (expert research expenses distinguished from costs for exhibit preparation). The awarding of costs for preparation of exhibits is committed to the discretion of the trial court, *Mikel v. Kerr*, 499 F.2d 1178, 1183 (10th Cir. 1974), and we find no abuse of that discretion here.

[6] It has been stated that a federal court sitting in diversity may in its discretion, notwithstanding this general rule, enforce "an expressed state policy of taxing expert witness fees as part of costs." Henlopen Hotel Corp. v. Aetna Ins. Co., 38 F.R.D. 155, 161 (D. Del. 1965); De-Thomas v. Delta S.S. Lines, Inc., 58 F.R.D. 335, 342-43 (D.P.R. 1973); Chemical Bank v. Kimmel, 68 F.R.D. 679, 681-82 (D. Del. 1975). We do not need to consider this postulate as the trial court here chose to follow the general rule and did not purport to apply any contrary, clearly expressed state rule.

SCOTT FIELD PROJECT

Joined with CleveRock's claim for relief based on the Dove Creek Agreement was a second claim relating to a proposed water flood project in Oklahoma (Scott Field project). The district court concluded after the trial on this claim (1) that there was a valid contract between CleveRock and Trepel Petroleum Company (TPC), rather than Trepel individually, (2) that the contract was breached by TPC, but (3) that CleveRock had failed to establish any damages as a result of the breach. The court dismissed on the merits TPC's counterclaim that the Scott Field Agreement had been orally modified and thereafter breached by CleveRock.

TPC vigorously contends on appeal that the Colorado District Court had no personal jurisdiction over TPC and therefore could not enter a valid judgment regarding the Scott Field project. We disagree.

In this diversity proceeding, service of process was predicated on the Colorado long-arm statute, which provides, in pertinent part:

> Engaging in any act enumerated in this section by any person, whether or not a resident of the state of Colorado, either in person or by an agent, submits such person . . . to the jurisdiction of the courts of this state concerning any cause of action arising from:
>
> (a) The transaction of any business within this state . . .

Colo. Rev. Stat. § 13-1-124(1) (1973). This statute confers jurisdiction limited only by the bounds of the Fourteenth

Amendment, consistent with the standards of due process enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and subsequent cases. In *Hanson v. Denckla*, 357 U.S. 235 (1958), the Supreme Court elaborated upon the constitutional bounds of jurisdiction, stating: "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253. It is against this test — affirmative conduct invoking the benefits and protections of the forum's laws — that the salient facts of each case must be judged.

The facts of this case cumulatively satisfy this test of due process.[7] *See Pedi Bares, Inc. v. P & C Food Markets, Inc.*, 567 F.2d 933, 937 (10th Cir. 1977); *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151, 155 (5th Cir. 1974). Trepel, president of TPC,[8] came to Colorado and, in the course of various business negotiations, orally agreed to the terms of the Scott Field contract. Under the terms of the executory contract, TPC was obligated to send payment to CleveRock in Colorado for the performance of supervisory and managerial functions. TPC reasonably could have anticipated that CleveRock's duties under the contract would be largely performed at CleveRock's headquarters in Colorado — *i.e.*, the assignment of an interest in the project

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[7] Jurisdiction has been sustained on the basis of facts more tenuous than those presented here. *See, e.g.*, Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 494-97 (5th Cir. 1974). While we find doubtful support for the broad language of these cases, it is not necessary to discuss them here where a number of significant factors are present in addition to the performance of the contract by the plaintiff in the forum. *Cf.* Pickens v. Hess, 573 F.2d 380, 383-84 (6th Cir. 1978).

[8] While we recognize that Trepel and TPC are separate legal entities, we must consider Trepel's activities in negotiating the Scott Field Agreement before TPC was formed in determining jurisdiction. TPC, in later accepting the benefits of a contract negotiated by its promoter, must also accept the jurisdictional burdens *in pari materia*.

to TPC, the preparation of the development plan, and the payment of invoices.[9]

Once we determine there are some contacts with the forum, resulting from affirmative acts of the defendant, we must look to one further test of due process. The exercise of jurisdiction must comport with traditional notions of fairness and justice. "It must not be unfair or unreasonable to require the nonresident to defend the suit in the forum." *Product Promotion, Inc. v. Cousteau,* 495 F.2d 483, 497-98 (5th Cir. 1974); 2 *Moore's Federal Practice* ¶4.25[5], at 264-66 n.16 (2d ed. 1979). While fairness is not an affirmative basis for granting jurisdiction,[10] unfairness may become a factor in determining whether certain contacts are sufficient.

On the facts of this case, the district court's assertion of jurisdiction was not unfair. TPC has sufficient contact with Colorado to meet the test of due process.

AFFIRMED.

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[9]There may be additional bases for a finding of jurisdiction in this case. For instance, there is evidence that Trepel made the telephone call to Colorado to initiate the business relationship of the parties. There is contradictory evidence, though, and the judge below made no specific finding upon which we can rely.

[10]We are not persuaded, as was the trial court, that the ease of mobility is a consideration in determining whether there is jurisdiction over TPC. *See* Record, vol. 6, at 3. The Supreme Court in Hanson v. Denckla warned "it is a mistake to assume that [progress in communications and transportation] heralds the eventual demise of all restrictions on" personal jurisdiction.

> Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.

357 U.S. at 251.